STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 19, 2004
v	No. 244818 Iosco Circuit Court
CHRISTOPHER RAY LANCASTER, Defendant-Appellant.	LC No. 02-004347-FH

Before: Murray, P.J., and Murphy and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (persons under thirteen years of age). Defendant was sentenced to eighty-six months to fifteen years' imprisonment for each of his convictions. We affirm.

I. Material Facts

Defendant resided with his girlfriend, SJ, along with her two daughters, AJ and TJ, for approximately six years. On December 20, 2001, SJ was arrested after defendant came home drunk and called the police regarding a warrant out for SJ's arrest for the failure to pay child support.

Nine-year-old[1] AJ recalled the day at issue because her mother went to jail on that day. According to AJ, defendant asked her for a glass of ice water after she returned home from school. AJ brought defendant a glass of water, and defendant asked her to come to him. Defendant proceeded to remove AJ's and his clothing. Defendant then placed AJ on the bed, and got on top of her. Defendant touched his "private" area with AJ's "private" area, and proceeded to move "up and down." On cross-examination, AJ indicated that defendant would touch her every time her mother went to jail or to the store. On the particular occasion relating to this incident, AJ indicated that her sister, TJ, was also sleeping in the bed, and that she woke up because AJ was crying. Defendant informed TJ that AJ was crying because she missed her

[1] Ages provided in this opinion represent the age of the victims at the time of trial.

friend. AJ further testified that, later that night, she went to McDonalds with defendant, and the car they used broke down.[2]

Seven-year-old TJ testified that, on one occasion, defendant got on top of her while both were unclothed. Specifically, TJ indicated that defendant touched her "privates" with his "privates," and "humped" her, or moved up and down while on top of her. TJ also recalled an incident when defendant got on top of AJ. According to TJ, she, AJ, and defendant were sleeping in defendant's bed, and defendant indicated that it was going to be cold. Defendant then proceeded to do "the same thing" to AJ as he had done to TJ. TJ explained that the incident took place on the same day that her mother was arrested, but further indicated that it also occurred on other occasions. TJ denied telling Trooper Jennifer Pintar that nothing happened to her.

Sometime prior to the trial, AJ and TJ informed SJ and her friend, Sally Barbier, about the incident. After defendant went to jail, AJ informed her mother and Barbier about the incident. According to AJ, when she informed her mother and Barbier about the incident, TJ began tickling her legs, so AJ began to laugh. AJ testified that her mother thought she was lying to her because she was laughing.

SJ testified that AJ told her that "her dad" molested her, but that TJ denied that it happened. SJ found it unusual that AJ was giggling, would not look at SJ, and would not answer her questions when AJ told her about the incident. SJ did not believe that defendant committed the acts against her daughters.

Barbier testified that AJ and TJ told her and SJ that defendant laid on them in the bed, "messed around" with them, and that he made them "suck" on him. Barbier also indicated that AJ and TJ stated that defendant stated he would "whip" them if they told anyone. Barbier stated that the victims were crying when they informed her and SJ about the incident.

Trooper Pintar interviewed defendant, and he denied molesting AJ and TJ. Upon interviewing the victims, Pintar indicated that TJ initially denied that anything happened between her and defendant, but that AJ did not deny that anything happened between her and defendant. TJ later explained to Trooper Pintar that she initially denied that anything happened between her and defendant because she was afraid that she would be removed from her home.

Lane Evick testified that defendant informed him that, on one occasion when SJ was incarcerated, one of his "daughters" entered his bedroom while he and the "older" daughter were both unclothed. According to Evick, defendant explained that he sent the "older" daughter to tell the "younger" daughter that everything was "okay," and that "nothing was going on." Defendant also indicated that he had rolled over onto his "daughter," and that this upset the "younger daughter."

Defendant, testifying on his own behalf, stated that on December 20, 2001, he got into an argument with SJ. As a result of the argument, defendant called the police regarding an

[2] SJ indicated that she saw defendant and her daughters between ten and eleven in the evening that same day, when they picked her up from Tuscola County Jail.

outstanding warrant for SJ's arrest. Defendant had been drinking, and he passed out. Defendant's boss called him that morning, and defendant asked for $200 in order to bail SJ out of jail. Defendant explained that when AJ and TJ returned from school, they went to his boss' house to borrow the money, and defendant took the children to McDonalds. After going to McDonalds, defendant's van broke down. Defendant's friend, Jim Lipton, picked defendant and the children up, and took them to Caro to bail SJ out of jail. Defendant denied molesting either TJ or AJ. Defendant also denied making any statement to Evick regarding the victims.

Defendant further indicated that he had a disagreement with Barbier, and that she informed him that she was going to enact revenge upon him for removing her from his home. According to defendant, Barbier admitted that she lied that the victims informed her that defendant molested them. On rebuttal, Barbier explained that she did write a statement denying that defendant committed the acts against the victims for the reason that defendant threatened to kill her.

II. Tender Years Exception

Defendant first argues that the trial court erred by permitting Barbier to testify regarding acts of oral sex pursuant to MRE 803A. We disagree. "The decision whether evidence is admissible is within the trial court's discretion and should only be reversed where there is a clear abuse of discretion." *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Prior to trial, following a hearing on defendant's motion in limine to exclude the prosecution's proposed evidence under MRE 803A, the trial court ruled that Barbier's proposed testimony was tentatively admissible, excluding the proposed evidence that defendant made the victims take a bath and that defendant threatened SJ in the victims' presence. At the motion hearing, Barbier stated that AJ and TJ informed her and SJ that defendant touched them in "their bad place," that he made them "suck on him," and that he would "beat" them if they told anyone.

At trial, Barbier testified as follows:

> They said mom, we got to tell you something. Dad laid us in the bed and messed around with us and made us suck on him. And then he said – they said – [AJ] and [TJ] said if we told anybody he was going to whip us.

Defense counsel timely objected to Barbier's testimony, indicating that it did not fall under MRE 803A because it was not the incident to which TJ and AJ testified. The trial court overruled defense counsel's objection. Following cross-examination of Barbier, defense counsel moved to strike the evidence on the grounds that it did not fall under MRE 803A. The trial court again overruled defense counsel's objection.

The evidentiary rule commonly referred to as the "tender years" exception to the hearsay rule provides, in part, that "[a] statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding . . . ." MRE 803A. Corroborating evidence consists of that which confirms or strengthens the testimony of another witness. *Schwartz v Davis Mfg Co*, 32 Mich App 451, 456; 189 NW2d 1 (1971).

We find that Barbier's testimony corroborated the testimony provided by the victims. Each of the victims testified, despite defendant's suggestion otherwise, that they informed Barbier regarding the incidents to which they testified. TJ specifically stated that she told Barbier "the same thing that I'm telling you guys." Additionally, AJ testified that she informed her mother and Barbier of defendant's actions toward her on the day SJ went to jail. Although Barbier's testimony related that the victims informed her that defendant made them "suck on him," Barbier's testimony confirmed the victims' testimony that they informed her and SJ about the incidents involving them and defendant. Accordingly, the trial court did not err in admitting Barbier's testimony at trial pursuant to MRE 803A.

Regardless, we find that even if the admission of the testimony was erroneous, any error that may have occurred would have been harmless. A preserved nonconstitutional error is not grounds for reversal unless it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Here, each of the victims described the incidents involving defendant in detail. Additionally, although the victims each indicated that defendant engaged in acts with them on days other than the day in question, each recalled the incident of the specific day in question because their mother had been arrested the previous evening. Thus, even if the challenged evidence were excluded, defendant has failed to demonstrate that it is more probable than not that defendant would have been acquitted. Accordingly, defendant has failed to demonstrate that any error committed was outcome determinative. *Lukity*, *supra*.

III. Offense Variable (OV) 3

Finally, defendant argues that he is entitled to resentencing because the trial court improperly assessed five points under OV 3, or alternatively that defense counsel was ineffective because he failed to object to the scoring at sentencing. We disagree.

Because defendant did not raise the scoring issue at or before sentencing, it is not preserved for appellate review. MCR 6.429(C); *People v McGuffey*, 251 Mich App 155, 165-166; 649 NW2d 801 (2002), lv den 468 Mich 859 (2003).[3] The issue may, however, be reviewed for plain error where "the trial court's error resulted in a sentence that was not within the appropriate legislative guidelines range." *People v Kimble*, 252 Mich App 269, 276-277, n 5; 651 NW2d 798 (2002), lv gtd 468 Mich 870 (2003). This Court will uphold the sentencing court's scoring decisions if there is any supporting evidence in the record. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

At sentencing, five points were assessed under OV 3, which relates to physical injury to a victim. MCL 777.33. Specifically, five points should be assigned to the guidelines score when

[3] Although defendant contends that this issue has been properly preserved because he raised this issue in a motion to remand before this Court pursuant to MCL 769.34(10), *McGuffey*, *supra*, holds that the court rule prevails over the conflicting statutory provision.

"[b]odily injury not requiring medical treatment occurred to a victim." MCL 777.33(1)(e). Five points may not be assessed under OV 3 if "bodily injury is an element of the sentencing offense." MCL 777.33(2)(d).

The presentence investigation report indicates that AJ stated that after defendant "put his weiner [sic] down there (pointing to her vagina) and went up and down," she was badly hurt. Additionally, the presentence investigation report indicates that TJ stated that after she was assaulted by defendant, it "hurt her 'wee wee'" when she went to the bathroom and when she sat down, that she hurt while defendant was on top of her, and that she would cry.[4]

Defendant contends that the trial court erred in assessing five points under OV 3 because the only injury alleged was pain, and because pain, alone, is insufficient to constitute bodily injury. Pain, however, is a general indication that bodily injury of some type occurred. Accordingly, we find that there was ample evidence to support the trial court's scoring of OV 3.

Because counsel is under no obligation to raise meritless objections, *People v Torres*, 222 Mich App 411, 425; 564 NW2d 149 (1997), defendant has failed to establish that his trial counsel's performance fell below an objective standard of reasonableness or that there was a reasonable probability that absent counsel's failure to object, the proceedings would have been different. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Thus, defendant's claim of ineffective assistance of counsel likewise fails.

Affirmed.

/s/ Christopher M. Murray
/s/ William B. Murphy
/s/ Jane E. Markey

[4] Defendant does not challenge the accuracy of the presentence investigation report on appeal, and he did not challenge its accuracy concerning these statements before the trial court.